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|---|---|
| Reportable: | ~~YES /~~ NO |
| Circulate to Judges: | ~~YES~~ / NO |
| Circulate to Magistrates: | YES / ~~NO~~ |
| Circulate to Regional Magistrates: | YES / ~~NO~~ |

# IN THE HIGH COURT OF SOUTH AFRICA
## (Northern Cape Division)

Case No: CAR& 68/2006
**Heard: 21/09/2006**

**Delivered: 29/09/2006**
In the matter:

**PIETER VILJOEN** **Applicant**

and

**THE STATE** **Respondent**

Coram: **Tlaletsi AJP** *et* **Mokgohloa AJ**

## JUDGMENT ON APPEAL

**Tlaletsi** ***AJP:***

1. The applicant appeared legally represented before the Magistrate Court at Hanover on a charge of Assault. He was on 29 September 2005 convicted as charged and sentenced to R 500-00 fine or 50 days imprisonment, plus a further 90 days imprisonment which is wholly suspended for a period of 4 years on condition that he is not convicted of assault or attempt thereto or any other offence having assault as an element thereof, committed during the period of suspension and to which he is sentenced to direct imprisonment without the option of a fine. He is appealing against his conviction only.

2. According to the documents on the file the Notice of Appeal was received by the Clerk of the Court on 19 October 2005. This is according to the date stamp reflected on the notice itself and what the appellant alleges in his affidavit in support for an application for condonation for late filing of the application. Of note however, is that the Notice of Appeal itself is dated 20 October 2005, being a day later than the day on which it was received by the Clerk of the Court. Of further note is that the 19th was in fact the last day for filing a Notice of Appeal in terms of Section 309B (1)(b) of the ***Criminal Procedure Act 51 of 1977*** ("the Act") and subrule (1) of the Magistrate's Court Rule 67. Nevertheless the condonation was granted by the Magistrate.

3. The application for leave to appeal was heard on 2 February 2006. In his one paragraph (5 lines) judgment the trial Magistrate stated that seeing that he is of the opinion that every person has a right to appeal and that a possibility that another court may possibly arrive at a different conclusion cannot be excluded, granted the applicant Leave to appeal.

4. The record of the proceedings that has been filed is incomplete. It contains the charge sheet and the

mechanically recorded transcript only contain the cross-examination of the appellant by the prosecutor, arguments of both the state and the accused's legal representatives, the judgment on the merits by the court, arguments by the parties regarding sentence, the judgment or reasons for sentence by the magistrate as well as the proceedings relating to the application for leave to appeal. The missing portions are the plea proceedings, evidence in chief and the cross-examination of the complainant and two state witnesses, as well as the evidence in chief of the appellant and part of his cross-examination by the state.

5. Accompanying the record is a memorandum from the trial Magistrate with a heading "Redes vir Skuldigbevinding en Vonnis". In the memorandum he explains that during the hearing of the application for leave to appeal he noticed that the cassette tapes were missing from the envelope used for keeping them. After the application for leave to appeal was disposed of the enquired from the Office of the Court Manager about the whereabouts of the tapes. The latter undertook to make enquiries from the Clerk of the Court who was at the time on leave. Upon receipt of the typed record, he continues, he noticed that the only one tape has been transcribed. He also refers to the affidavits of the Manager and the Clerk

of the Court stating that they do not know about the whereabouts of the other tape.

6. The trial Magistrate further states that he is fully aware of the legal requirements relating to reconstruction of the record that is lost and that he is unable to reconstruct the record because of the following reasons, and I quote:

> "1) Die Hof doen drie howe, naamlik Hanover, Petrusville en Philipstown waartydens die Hof verskeie sake per dag afhandel;
>
> *2) Dus is dit baie moeilik on na die verloop van verskeie maande sedert die datum van verhoor van die saak op 29 September 2005 en die ontvangs van die getikte oorkonde 27 Maart 2006 die feite van die saak te onthou;*
>
> *3) Veral wat betref die kruisverhoor van die onderskeie getuies deur die verdediging is dit basies onmoontlik;*
>
> *4) Weens die lang verloop van tyd is die Hof se kriptiese aantekeninge ook nie meer beskisbaar nie. Weens die aard daarvan sout dit in elk geval nie van veel nut gewees het nie.*
>
> *5) Die Aanklaer wat destyds aangekla het, Mnr A.R. White is ook intussen verplaas en kan dus die Hof ook nie behulpsaam wees nie.*
>
> *Gevolglik is dit nodeloos vir die Hof om enigsins redes vir skuldigbevinding en vonnis te gee aangesien die volledige oorkonde nie beskikbaar is weens die nalatigheid van die administratiewe personeel van die Landdroskantoor, Hanover nie. Gevolglik versoek die Hof respekvol dat die Agbare Appèlregter die skuldigbevinding en vonnis sonder meer ter syde stel."*

7. The grounds of appeal prepared by the appelalnt's

legal representative who appeared for the appellant at the trial are:

*"1. Die Hof a quo het fouteer te bevind dat Appellant die beskuldigde aangerand het, soos aangekla.*

*2. Die Hof a quo het fouteer deur te bevind dat die getuies vir die staat geloofwaardig is.*

*3. Die Hof a quo het fouteer deur die beskuldigde se weergawe te verwerp.*

*4. Die Hof a quo het fouteer deur nie die getuienis van die staatsgetuies te verwerp nie.*

*5. Die Hof a quo het fouteer deur nie te bevind dat die beskuldigde se weergawe redelik moontlik waar is nie.*

*6. Die Hof a quo het fouteer deur te bevind dat die staat sy saak bo redelike twyfel bewys het."*

This is the Notice in terms of Section 309B of the Act which I have already mentioned that is dated on 20 October 2005 at Middelburg (Cape) and served on 19 October 2005.

8. The legal position regarding the record of the proceedings was crisply stated as follows in ***S v Chabedi*** 2005(1) SACR 415 (SCA) at 417e – h:

"On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible (see, eg, ***S v***

***Collier*** *1976 (2) SA 378 (C) at 379A - D and* ***S v S*** *1995 (2) SACR 420 (T) at 423b - f).*

*The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal."*

Before dealing with the question whether there is sufficient material before us to determine the issues raised by the appellant as his grounds of appeal, I need to consider whether proper steps have been taken to reconstruct the record.

9. The memorandum prepared by the Magistrate is in my view a statement of the problem that may be encountered should there be an attempt to reconstruct the record. It in no way reflect any attempt by the Magistrate or the Clerk of the Court to initiate the process of reconstruction. It may be accepted that steps were taken to trace the missing tape and bore no fruits. However, in my view the matter does not end there.

10. In *casu*, the appellant was legally represented at his trial. It is not known what role did his legal representative play to assist the reconstruction process. Surely one would have expected him to have made at least a note of the evidence in chief of the state witnesses and cross examination of the appellant. Mr Schreuder who appeared on behalf of

the appellant before us, was unable to indicate to us the attempts if any, that have been made by the trial attorney to assist in reconstruction. He is in any case an important party in the reconstruction of the record, and without his views and those of his clients the process will be questionable.

11. It is also clear from the memorandum that no attempts have been made to request the trial prosecutor to contribute to the reconstruction process. All that has been said about him is that he has since been transferred and as a result he will not be in a position to help the reconstruction process. In the absence of his express confirmation that he cannot recall what transpired during that trial, it will be premature to conclude that he will not be of any assistance. It is not in dispute that only three witnesses testified for the state and that the appellant called no witnesses other than his own testimony. The whereabouts of these witnesses is not canvassed in the memorandum. It is also not known if the police docket is still available with statements of the witnesses which can be a helpful tool in the reconstruction process.

12. I am therefore not satisfied that attempts have been made to reconstruct the record. It would therefore in my view be improper to at this stage endeavor to

transverse the merits of the appeal and decide whether there is sufficient material, to decide the appeal. The grounds of appeal are set out in general and vague terms. No particulars have been provided of the complaints the appellant has against the judgment of the Magistrate. In his judgment he has given reasons why he has accepted the version of the state witnesses and rejected the appellant's version. The recorded argument by the state and the defence give an indication of the issues that were highlighted at the trial.

13. It would at this stage be pre-mature to decide whether there is sufficient material before court. This will be the task of the eventual court of appeal after a genuine process of reconstruction. A person who has been convicted and sentenced has a right to approach an appellate Court to prosecute his or her appeal and is entitled to have this right protected. On the other hand victims of crime have a right to have their complaints duly adjudicated. It would not be fair to alleged victims of crime and the society to have an appeal of someone convicted by a competent court succeeding on grounds unrelated to cogency of evidence. A conviction by the court a quo is neither provisional nor conditional upon a higher court concluding that it was in order. See: ***S v Zondi*** 2003(2) SACR 227 (W) at 240i-j. I would

therefore be inclined to order that the matter be referred back to the clerk the court with the instruction that she or he obtain the best secondary evidence of the contents of the tape lost which was part of the record. This view was supported by Mr Bagananeng on behalf of the respondent, although it was not raised in his Heads of Argument. I do not therefore, accept the contention on behalf of the appellant that *"maybe, attempts were made but were unsuccessful."* The contention is in my view speculative.

In the result I make the following order:

1. **The Appeal is postponed sine die.**

2. **The matter is referred back to the Clerk of the Court, Hanover, with the instruction that she or he obtain the best secondary evidence of the contents of the lost part of the record**.

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**L P TLALETSI**
**ACTING JUDGE PRESIDENT**
**NORTHERN CAPE DIVISION**

I concur

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**F E MOKGOHLOA**
**ACTING JUDGE**
**NORTHERN CAPE DIVISION**

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| **For the Applicant:** | **Adv J J Schreuder** |
| **Instructed by:** | **Du Toit – Bomela Attorneys** |
| | |
| **For the Respondent:** | **Adv W Bagananeng** |
| **Instructed by:** | **Director of Public Prosecutions** |